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No. 81-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re Wheat Farmers Antitrust Class Action Litigation M.D.L. No. 129

JOE ZINSER, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

JOHN SPEARMAN, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED*

Whether this Court's rule in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, rehearing denied, 434 U.S. 881 (1977), that a cause of action based on a horizontal price-fixing conspiracy can not be brought by a party removed more than one step in the distribution chain from the price-fixer, also bars every restraint of trade claim brought pursuant to 15 U.S.C. § 1?

Whether that rule in *Illinois Brick* also bars every attempted monopolization and monopolization claim brought pursuant to 15 U.S.C. § 2?

Whether an antitrust plaintiff, who brings a class action and is successful in certifying that class, has a claim of right to reimbursement for reasonable expenses, court costs and attorneys' fees based on the doctrine of *quantum meruit* once the cause of action has, *ex post-facto,* been judicially banned?

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* The parties hereto are:

1. Joe Zinser;
2. John Spearman;
3. All wheat farmers in thirty-four designated counties in the panhandle and adjacent areas of north Texas who sold wheat on the open market from May 1, 1972, until September 1, 1972;
4. All wheat farmers in Curry County, New Mexico, who sold wheat on the open market from May 1, 1972, until September 1, 1972;
5. Clarence Palmby;
6. Continental Grain Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet officially reported, but is unofficially reported at 1981-2 *Trade Reg. Rp.* (CCH) ¶ 64,208 (10th Cir. dated August 6, 1981). (App. 1a). The Opinion of the Court of Appeals denying rehearing is not reported and appears in the Appendix (App. 19a). The Opinion of the District Court is not published and appears in the Appendix (App. 22a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1981. A timely petition for rehearing was denied on September 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

Pertinent portions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth in Appendix at 89a.

STATEMENT OF THE CASE

A. The Soviet Grain Deal of 1972

In the Soviet Union, the winter of 1972 produced minimal snowfall which was insufficient to replenish the Soviet soils of the usually productive Volga crop basin with desperately needed water. Consequently, the harvesting of Soviet winter wheat sowed in the Fall of 1971 was damaged by winterkill resulting in a dire need for a successful summer crop.

Coinciding with the mild winter was a summer high pressure system which parched the land and shriveled the entire crop. The light rainfall and the scorching temperatures caused by winds blowing oven-dry air from the Kazakh desert destroyed the basin's hope of curing the prior crop loss. The actual shortfall of the winter and summer crop resulted in a Russian need for an alternative source to cover some four hundred and nineteen million bushels of wheat.

Meanwhile, the inverse was occurring in the United States; the wheat crop exceeded expectations despite governmental attempts to pay farmers to plow under portions of seeded fields, grain elevators began filling to capacity, grain prices were depressed, and Commodity Credit Corporation wheat surpluses surpassed all time highs.

Plainly enough, the Soviet Union easily found the American wheat market ripe for a sale. The United States Department of Agriculture ("USDA") was not only ready, having forecasted the Soviet crop disaster through their network of scouts reporting on the harvest, but was overly eager to have the Soviets enter the grain markets in an attempt to alleviate a depressed market and raise for farmers the price they would acquire for their crops on the free open market before November's election. So eager was the United States that it determined to promote American-Soviet sales through an extension of credit.

Against that backdrop, one of the largest antitrust conspiracies in the history of this country was set into motion, targeted against the American wheat farmer. Continental Grain Company ("Continental") conspired with Clarence Palmby, ("Palmby"), then As-

sistant Secretary of Agriculture, to withhold and suppress from the wheat market the true demand for wheat.

A series of clandestine meetings were held early in 1972 in which Continental lured Palmby from the USDA through the offer of a lucrative executive position with Continental. It was while Palmby was involved in his transition from his position with the USDA to Continental's employment that Agriculture Secretary Butz gave Palmby the responsibility of preparing the negotiating scenario for the Russian wheat sale. Having already decided to leave the USDA for the private sector, Palmby coordinated and took an active role in the government-to-government negotiations. From his trip to Mascow, Palmby brought back valuable inside information concerning the Soviet's intentions, which he applied to the sole benefit of Continental.

Palmby then met with executives of Continental to prepare another scenario, this time one in which they would combine and conspire to restrain the market's trade and attempt to monopolize the sale of wheat to the Soviet Union. Recognizing their inability to maintain the then current price for wheat should news of the sale be made public, Continental and Palmby devised a scheme in which Continental could monopolize the wheat sale through the suppression of information concerning the sale to the Soviet Union. By withholding information, Continental and Palmby plotted, the true functioning of market forces, such as supply and demand, could be so tampered that the effect would be the maintenance of the market's then low price levels, enabling Continental to buy at

inordinately low prices from farmers and sell high to the Soviet Union.

Accordingly, Continental and Palmby combined and conspired to monopolize and restrain trade in the Soviet sale by interfering with market forces through such activities as Palmby's refusal to direct that sales be made on a government-to-government basis; that the terms of the proposed grain sales, required by federal law to be reported, be suppressed; Continental's submission of false government export documents; Continental's purchasing of CCC wheat at a depressed price; and Palmby's divulging the substance of Soviet negotiations to Continental, placing it in lucrative position of cornering the market.

B. The Decision of the District Court

In 1972, Joe Zinser and John Spearman filed separate class actions [1] in United States District Court for the Northern District of Texas alleging that Continental and Palmby had combined and conspired to restrain trade and that they attempted to, and did successfully, monopolize the grain sale to the Soviet Union in violation of Sections 1 and 2 of the Sherman Act. The two actions were consolidated by the Judicial

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[1] Zinser had filed his cause of action on the 16th day of November, 1972, on behalf of all wheat farmers similarly situated in thirty-four counties in the northern panhandle of the State of Texas.

Spearman had originally filed his cause of action on the 2nd day of January, 1973, on behalf of all wheat farmers similarly situated in Curry County, New Mexico. However, the class certification was solely those wheat farmers similarly situated in Curry County, New Mexico.

Panel on Multidistrict Litigation for pre-trial proceedings in the Western District of Oklahoma where a similar suit, *Cleveland* v. *Palmby*,[2] was pending.[3]

On June 30, 1975, the trial court certified the classes, consisting of all wheat farmers who sold wheat on the open marekt from May 1, 1972, until September 1, 1972, in their respective geographic regions.[4]

Discovery progressed until, in 1977, when this Court rendered its decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977). The trial court then granted an extension of time for discovery and requested briefs on the *Illinois Brick* issue.

On June 25, 1979, the trial court entered an order holding *inter alia*, *Illinois Brick* applied to all the claims[5] in all three cases, finding that *Illinois Brick*

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[2] Edgar W. Cleveland, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972, until September 1, 1972, v. Clarence Palmby, Continental Grain Company, Cargill, Inc., Louis Dreyfus Corp., Cook Industries, Garnac Grain Company and Bunge Corp., Civil Action No. CIV-72-731 (W.D.Ok. filed October 24, 1972). This case solely involved a Section 1 claim.

[3] *See In re Wheat Farmers Antitrust Class Action Litigation*, 366 F.Supp. 1087 (J.P.M.L. 1973).

[4] Zinser was named to represent a class of about 12,000 wheat formers in thirty-four counties in the panhandle of Texas. Spearman was named to represent a class of between 600 and 1,500 wheat farmers in Curry County, New Mexico.

[5] The district court dismissed both plaintiffs' Section 1 claim of restraint of trade and plaintiffs' Section 2 claim of monopolization and attempt to monopolize.

was dispositive of the claims; and determining that *Illinois Brick* precluded all antitrust causes of action, regardless of their characterization, by one who was more than one step removed in the distribution chain from the antitrust violator.

Both of these plaintiffs filed timely motions under *Fed. R. Civ. P.* 59. These motions, which raised some matters not referred to in the previous order of June 25, 1979, were treated in the trial court's subsequent order of November 13, 1979. The trial court was not persuaded to alter its ruling that *Illinois Brick* was applicable to the Sections 1 and 2 violations in these cases. Subsequently, the Court entered an Amendment to Judgment that same day, dismissing with prejudice the Sections 1 and 2 claims of all members of the classes who did not sell wheat directly to the defendant, Continental, and dismissing without prejudice the Section 1 and 2 claims of all the members of the class who did sell directly to Continental.

Timely notices of appeal were filed on December 5, 1979.

C. The Decision of the Court of Appeals

On appeal from the trial court's decision, the Court of Appeals sustained on all grounds but one * the trial court's decision. The court held, after so construing these "pre-*Illinois Brick*" pleadings as to find therein

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* One of the issues presented on appeal was the appropriateness of the trial court's refusal to remove a communications ban between plaintiffs' counsel and any member of the class where the communications was not initiated by the class member. In light of *Gulf Oil Co.* v. *Bernard*, —— U.S. ——, 44 U.S.L.W. 4604 (June 1, 1981, the Court of Appeals reversed the imposition of the trial court's unfounded and unsubstantiated ban.

"pass-on" allegations of an undercharge[7], that *Illinois Brick* applies to the matter at hand since "[i]t logically follows that an indirect seller . . . may not recover for an undercharge set in motion by the indirect buyer's unlawful activities," 1981-2 *Trade Reg. Rp.* (CCH) ¶ 64,208 at 73,784 (App. at 13), and held that *all* antitrust claims are barred from being presented in *Zinser* and *Spearman*. Additionally, the court held that no exceptions to *Illinois Brick* were present; that the district court did not abuse its discretion by failing to certify as a class the approximately three hundred wheat farmers who were direct sellers; and that there was no error in the district court's denial of plaintiff's request for attorneys' fees for efforts which resulted in class certification prior to this Court's holding in *Illinois Brick*.

The Court of Appeals believed that *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, *rehearing denied*, 616 F.2d 659 (5th Cir.), *cert. denied, Safeway Stores, Inc.* v. *Meat Price Investigators Association*, ——— U.S. ———, 101 S.Ct. 280 (1980), ("the *Beef Case*") applied the general rule of *Illinois Brick* in a fact situation believed to be akin to those presented in *Zinser* and *Spearman*.[8] Under *the Case*, the court

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[7] 1981-2 *Trade Reg. Rp.* (CCH) ¶ 64,208 at 73,782, n. 4 (App. at 7a).

[8] So fixated was the court with the *Beef Case* that it in fact molded these cases to the *Beef Case*'s facts. The court tailored the facts to fit the *Beef Case* so as to apply the Fifth Circuit's opinion. Contrary to actual market functions, the court found that the defendant Continental purchased wheat at lower prices from middlemen who, in turn purchased wheat from wheat farmers at reduced prices (App. 8a). In fact, the structure of wheat industry is one in which the wheat farmer sells his grain upon harvesting to the country elevator who, sometime later, will sell that grain to exporters or to millers. (Addendum A).

reasoned, the rule of *Illinois Brick* precluded antitrust actions by sellers who have not dealt directly with the antitrust violator. The court relied on the *Beef Case,* rather than subsequent antitrust decisions holding that there are limitations to applicability of *Illinois Brick.*[9] The court merely construed the pleadings to find allegations of a "pass-on" of an undercharge requiring application of *Illinois Brick.*

The Court never addressed the central issue of the appeal, which was the inappropriateness of applying *Illinois Brick* to a Section 1 claim of restraint of trade and to a Section 2 monopoly and attempt to monopolize claims based on a conspiracy to suppress true market conditions in the wheat industry.

REASONS FOR GRANTING THE WRIT

I. EMPHATIC DISTINCTIONS MUST BE MADE BETWEEN THE APPLICABILITY OF *ILLINOIS BRICK* TO PRICE FIXING CLAIMS AND ITS INAPPLICABILITY TO MONOPOLIZATION CLAIMS AND OTHER RESTRAINTS OF TRADE

A. There is Continuing Confusion and Conflict Among the Circuits

1. *The Court of Appeals Has Expanded the Rule of* Illinois Brick *Beyond the Parameters Established By This Court and Has Applied* Illinois Brick *to Antitrust Violations Clearly Not Intended By This Court.*

The Court of Appeals has, by its decision in this case, expanded the parameters of *Illinois Brick* to include

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[9] The Court of Appeals never addressed the allegations as pled. Rather, the Court insisted that the restraint of trade involving interferences with market forces was an allegation of a conspiracy to "pass-on" a pre-determined fixed price upwards through the chain of distribution. The Court further failed to address the Section 2 claims.

any antitrust violation which would have as one result the stablization of price. The court-below has re-interpreted *Illinois Brick's* fact situation to go beyond the intended horizontal conspiracy to fix the price of a product which was then forced through, or "passed-on", to intervening levels and has applied *Illinois Brick* to all contracts, combinations or conspiracies to restrain trade and monopolize the market, whose antitrust basis is removed from and unrelated to any distribution chain.

Illinois Brick was never intended to go beyond a situation involving a horizontal conspiracy to fix the price of a product, and to "pass-on" that fixed price in the chain of distribution. That factual situation is analytically distinct from the situation posed by this litigation's "pre-*Illinois Brick*" pleadings. These pleadings have, since their inception, claimed that Continental and Palmby conspired, contracted and combined to monopolize the Soviet Wheat Sale of 1972 and restrain trade in the wheat industry through the suppression of information required by law to be made public so as to interfere with the free play of market forces, such as supply and demand. There has never been, nor could there be, allegations that Continental and Palmby contracted, combined or conspired to establish the price of wheat at a specific predetermined rate of $1.35 per bushel, and then force that price upwards in the distribution chain.

The distinctions present can best be illustrated by the attached graphic depictions of the *Wheat Cases, Illinois Brick,* and the *Beef Case,* Exhibits A, B and C, respectively found in the Addendum herein. *Illinois Brick* can best be depicted, as in Exhibit B, as a horizontal conspiracy which had agreed to a pre-

determined fixed price which was forced downward through, or "passed-on" to, intervening levels, affecting the prices paid by the claimant, the consumer (see Exhibit B).

In comparison, the *Beef Case* was the "flip side" of *Illinois Brick*. There was pled a horizontal conspiracy which formulated a pre-determined fixed price, which forced that fixed price upward through, or "passed-on" to, intervening levels, which affected the price sold by the claimants, the producers (see Exhibit C).

In contradistinction, the *Wheat Case* does not involve a horizontal conspiracy, a "pass-on" or any levels of distribution. As demonstrated by Exhibit A, the pleadings emphatically show a contract, combination or conspiracy between Continental and Palmby, removed from the distribution chain, interfering with the normal market forces by suppressing and withholding all information of the then impending Soviet Wheat Sale. This suppressing of vital market information was done to gain a monopolistic advantage in the Soviet Wheat Sale and to restrain trade in the wheat industry to provide Continental with a more favorable position in the market.

The Southern District of New York has recently recognized this type of claim as being outside the rule of *Illinois Brick*. *Pollock* v. *Citrus Associates of the New York Cotton Exchange,* 512 F.Supp. 711 (S.D. N.Y. 1981). Dealing with antitrust claims that defendants had affected the price of November contracts by restricting supply of offsetting contracts, the court refused to find the case within the ambit of *Illinois Brick*. *Illinois Brick* does not apply to every anticompetitive behavior aimed at the plaintiffs. *Id.* at 719. In *Pollock,* where the allegations claim plaintiffs

suffered due to tampering with the entire market, the court did not bother to look for direct dealings to determine if plaintiffs could bring their cause to action.[10]

The Court of Appeals failed to recognize the distinction made by other courts between *Illinois Brick's* horizontal conspiracy to pre-determine a fixed price and to force that fixed price through a distribution chain and other types of restraints of trade or monopolization involving antitrust violators permeating the market from outside the distribution chain.

It seems clear that *Illinois Brick* would have no place in an antitrust claim involving a refusal to deal where the grain companies conspired in deciding they would boycott every Texas wheat farmer.[11]

Nor would there be a dispute that *Illinois Brick* is inapplicable to cases involving the establishing of territorial restraints or monopolies dividing trade territories among competitors, each competitor taking one state.[12]

And clearly *Illinois Brick* is inapposite to a monopolization claim where Continental's predacious act involved buying from farmers at inordinately high prices and selling to consumers at below cost in order to eradicate competition.[13]

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[10] *Cf. In re Airport Car Rental Antitrut Litigation*, 474 F.Supp. 1072, 1108 (N.D.Cal. 1979) (rationale of *Illinois Brick* will not be expanded to new situations).

[11] *See Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959).

[12] *See United States* v. *Topco Associates*, 405 U.S. 596 (1972); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).

[13] *See Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *In re Japanese Electronic Products Antitrust Litigation*, 494 F.Supp. 1246 (E.D.Penn. 1980).

Since *Illinois Brick* was not designed to be extended beyond a horizontal conspiracy to fix prices intended to be "passed-on", a conspiracy to interfere with the natural workings of the entire competitive market and its forces of supply and demand is simply inapposite. This type of conspiracy was the same addressed by this Court in *United States* v. *Patten*, 226 U.S. 525 (1913), where the interference with market forces was performed by the buying of all the available cotton. The end result was distortion of the market place, with a "price-related" result of pegging or stabilizing price. However, the action was not based on a "pass-on" theory of price fixing, and today would not be barred by *Illinois Brick*.[14]

Similarly, *Illinois Brick* would have no application to an agreement to exchange confidential business information among competitors and suppress information from buyers. While this practice, too, distorts market forces and gives these competitors a superior bargaining position by reason of the collaboration to withhold market information from buyers, *Illinois Brick* was not limited to include such "price-related" activities.[15]

So, too, this Court never intended *Illinois Brick* to apply to claims of monopolization and restraint of trade involving an interference with market forces which would suppress true market information and which, while not involving a "pass-on" of predetermined fixed prices, would involve a "price-related" result of stabilizing prices.

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[14] *See also United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[15] *See Maple Flooring Manufacturers' Associates* v. *United States*, 268 U.S. 563 (1925). *See also F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).

Illinois Brick was simply intended to apply to a restraint of trade involving a horizontal conspiracy to fix a price of a product brought by a party who suffered injury solely as a result of that fixed price being forced through the chain of distribution.

Continental and Palmby did not conspire to arrive at a pre-determined fixed price; did not conspire with others on Continental's level to arrive at a pre-determined fixed price; did not force that pre-determined price upward to the producer. Rather, upon the pleadings, Continental and Palmby conspired to interfere with normal market forces and the laws of supply and demand in order to monopolize the Soviet Wheat Sale and restrain the wheat trade, thereby withholding from the farmer the true picture of the market. This tampering occurred outside the chain of distribution and was aimed directly at the wheat farmers.

Accordingly, this Court needs to make clear that *Illinois Brick* was never intended to be extended as lower courts have done. The importance of a clear distinction to the future enforcement of the antitrust laws compels this Court's review.

2. *The Wheat Decision Creates a Split in the Circuits on the Question of the Scope of* Illinois Brick *and Denies Petitioner Equal Protection of the Laws*

The decision of the Court of Appeals in this case reflects an irreconcilable conflict among the circuit and district courts concerning the issue upon which review is sought. Differing judicial interpretations of the proper scope of the rule of *Illinois Brick* have produced an area of the law in which there is confusion and clear need for guidance from this Court.

The Third Circuit Court of Appeals first addressed the issue of applying *Illinois Brick* to matters other than horizontal conspiracy to "pass-on" a fixed price. *Mid-West Paper Products* v. *Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979). That court indicated that it would only apply *Illinois Brick* to cases clearly coming with the same fact pattern:

> A different problem is presented . . . where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions or *monopolization*, since defendants' benefits in those instances are not so readily ascertainable and may not be sufficient to compensate "those individuals" whose protection is the primary purpose of the antitrust laws."

Id. at 585 n. 47 (emphasis added).

District courts within the Third Circuit interpreted *Illinois Brick*, in conjunction with *Mid-west Paper*, to apply solely in situations involving overcharges passed-on through chains of distribution. *See In re Japanese Electronic Products Antitrust Litigation*, 494 F.Supp. 1246 (E.D.Penn 1980) (antitrust violations are not required to be traced through a seller's distribution network in each instance to be cognizable under the antitrust law);[16] *Dart Drug Corp.* v. *Corning Glass Works, Inc.*, 480 F.Supp. 1091, 1101 (D.Md. 1979) (rationale of *Illinois Brick* makes it "abundantly clear" that suit is barred "only . . . where plaintiff's

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[16] *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Cromar Co.* v. *Nuclear Materials and Equipment Corp.*, 543 F.2d 501 (3rd Cir. 1976).

injury is premised on an 'overcharge' and where proof of pass-on is required").[17]

The Seventh Circuit Court of Appeals also refused to extend the rule of *Illinois Brick* beyond situations involving injuries alleged to have been passed through a single distribution chain. *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). The court found a "multi-faceted conspiracy" which, after consideration of the alleged activities as a whole, not after piecemeal inspection of the result, did not fit within the rule of *Illinois Brick* despite Fontana's absence of purchasing directly from Cessna.[18]

On August 6, 1981, the Tenth Circuit Court of Appeals in the *Wheat Case* had its first occasion to address the application of *Illinois Brick* to antitrust matters and has adopted an interpretation opposite that of Third and Seventh Circuits. The decision of the Tenth Circuit in the present case, which gives the rule of *Illinois Brick* a broad reading, applying it *mutatis mutandis* to a situation very different from that in which the rule was made, is at variance with those decisions which have held that *Illinois Brick*

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[17] *See Engine Specialties, Inc.* v. *Bambardier, Ltd.*, 605 F.2d 1, 18 (1st Cir. 1979) (*Illinois Brick* "involved a narrow question concerning the offensive use of the 'pass-on' rule . . ."); *Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F.Supp. 1150, 1158 (S.D.N.Y. 1979) (*Illinois Brick* presents a "narrow holding"); *In re Airport Rental Litigation*, 474 F.Supp. 1072, 1108 (N.D.Cal. 1979) (rationale of *Illinois Brick* will not be expanded to new situations).

[18] *Accord, Reiter* v. *Sonotone Corp.*, 406 F.Supp. 115 (D.Minn. 1980); *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978).

states a narrow rule which should not be expanded beyond the facts of the case.[19]

Stating that the defendant did not purchase directly from the plaintiff, without addressing the alleged restraint of trade and monopolization claims as alleged in the complaint,[20] the court held that all antitrust claims were barred by the rule of *Illinois Brick*. The court never addressed the pleadings' contentions [21] that the antitrust violation was not a horizontal conspiracy in the chain of distribution, but rather that the anti-

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[19] *See* note 17, *infra*.

[20] These cases have, since their inception, have never alleged a "pass-on" of a pre-determined fixed price, established by a horizontal conspiracy, forced into intervening levels of the chain of distribution. *Zinser* and *Spearman* have always alleged a restraint of trade due to the suppression of information. (*See Zinser*—App. at 56a-57a, 59a-60a, 62a, 63a, 64a, 65a-66a; *Spearman*—App. at 75a-76a, 77a-78a, 79a, 81a-82a, 83a, 84a-87a). The pleadings have stated that the true market force were attended from outside the distribution chain which left the price of wheat suppressed to a range of prices which would exist if, in a freemarket, there was a limited demand for wheat. The price of wheat would still fluctuate, but never elevate to the level had the market forces not been tampered. If plaintiffs had not first incurred the antitrust violations, the conspiracy by the defendants to restrain trade would never have been successful. Additionally, the Court did not address the complaints' allegations of defendant's attempt to monopolize of the Soviet Wheat Sale.

[21] This holding is incompatible with the rule recently reiterated by this Court that complaints must be liberally construed in favor of the pleader, *see McLain* v. *Real Estate Board of New Orleans, Inc.*, —— U.S. ——, 100 S.Ct. 502 (1980), a policy which has particular force in an antitrust case, *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969); 68 U.S. 563 (1925). *See also F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).

trust violation was in the nature of interference with exterior forces which influenced the wheat market. Additionally, the court never addressed the positions maintained by the Third and Seventh Circuit Courts of Appeals.

The District Court in the Southern District of New York recently addressed an issue similar to that presented here, in *Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F.Supp. 711 (S.D.N.Y. 1981). In *Pollock*, the allegations claimed that plaintiffs suffered due to the tampering with the entire market resulting from defendant's restricting of the supply of November contracts from outside the distribution chain. *Id.* at 719.

Only this Court can resolve the clear split now existing between the Circuits on this very issue. The federal laws were intended to apply, and must be applied, uniformly to all persons subject to those laws. The lack of similar treatment among persons seeking to sue under the antitrust laws, depending solely upon the circuit in which the suit is filed or to which the Multidistrict Litigation Panels removes, creates a clear and arbitrary denial to *Zinser* and *Spearman* of the equal protection of the laws as guaranteed to them by the Fifth Amendment to the United States Constitution.[22]

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[22] The Fifth Amendment to the United States Constitution does not specifically contain an equal protection clause. However, this protection has been implied under the Amendment's due process clause. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225 (1975); *Schneider* v. *Rusk*, 377 U.S. 163, 168, 88 S.Ct. 1187 (1954); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322 (1969); *Bollinger* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954).

B. The Circuit Court's Opinion Is In Direct Contradiction With Long-Standing Holdings of This Court

Illinois Brick involved a horizontal conspiracy to fix the price of a product which was then forced through, or "passed-on" to, intervening levels. It is this type of antitrust violation, and only this type, which this Court specificallly intended to judicially ban. The intent of this Court was to adopt "a unified 'mutuality' approach to 'passing-on' problems. . . ." *In re Beef Industry Antitrust Litigation,* 600 F.2d at 1157. The allegations of the present complaints, which predate this Court's rendering of *Illinois Brick,* emphatically demonstrates absence of "passing-on" price-fixing allegations. Rather the complaints are replete with allegations referring to defendant's conspiring to illegally withhold market information from the public.

Illinois Brick itself is a sharp departure from prior precedent, and difficult to reconcile with those cases which emphasize the breadth of the remedy of the antitrust laws. It is well noted by this Court that a distinct antitrust violation arises where the conspiracy's aim is to tamper with the entire market place in an attempt to monopolize and restrain trade industry-wide. This Court early held, in *United States* v. *Patten,* 226 U.S. 525, with regard to defendant's cornering of the cotton market, as follows:

> It may well be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand,* withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and

> consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Id. at 542 (emphasis added).

Additionally, a market controlled by a participant who dictates the interaction of market forces is analytically distinct from a horizontal price-fixing conspiracy "passing-on" a specified, pre-determined price. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

The Court of Appeal's opinion directly contradicts this Court's decision involving the application of the antitrust laws to violators affecting the entire industry:

> [Section 4] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . but is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

In fact, this Court, in its *Illinois Brick* opinion, neither explicitly nor implicitly overruled the decisions which incorporates these policies and, in fact, partly ratified them by reference to "the long-standing policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. The Court also noted, in the *Illinois Brick* opinion itself, that "considerations of *stare decisis* weigh heavily in the area of statutory construction," and pointed out further that there is a "presumption of adherence to prior decisions." 431 U.S. at 737.

The petition for certiorari should be granted to clarify this confused area of the law, to provide the guidance necessary to produce consistent judicial interpretations of the scope of the rule and its relationship to prior precedent, and to safeguard the enforcement of the antitrust laws. *See Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136 (1967); *Calhoun* v. *Harvey*, 379 U.S. 134, 137 (1964).

II. ILLINOIS BRICK IS INAPPOSITE TO THE MATTER AT HAND

A. The Attendant Problems of the "Pass-On" Theory in Antitrust Cases are not Present in These Cases

1. *There Are No Apportionment Concerns Nor Tracing of Damages in these Cases*

These causes of action pose no apportionment problem because plaintiffs have not made claim to damages traced through a chain of distribution. The allegations of the Amended Complaints assert damages resulting from a suppression of information to the public. The measure of damages would be the damage suffered by reason of the violation, *i.e.* based on what the market would have been but for the conspiracy.

In contrast, the problem addressed by this Court in *Illinois Brick* is a problem of tracing an overcharge to, and overpayment by, a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the overcharge might be absorbed by the payer.

In this action, however, there is no incremental tracing of damages through a distribution chain since the antitrust violation occurred separate and apart from the chain of distribution. The interference with market

forces occurred before price became a factor, distorting all factors subsequent to the violation. The wheat farmers were the direct recipients of the injury caused by the defendants. Therefore, any apportionment of damages will be only among the wheat farmers—the first and direct parties injured by the violation—not, as in *Illinois Brick,* among successive levels of the market itself.

2. *There is No Duplicative Recovery Claimed*

Since there have been no allegations of a "pass-on" of a fixed price, it is apparent that this Court's concerns expressed in *Illinois Brick* of duplicative recovery are not involved in these plaintiffs' claims. The allegations clearly demonstrate that the antitrust injury was inflicted from outside the distribution chain, (*i.e.* interference with true market conditions before these conditions were considered by distribution chain members) and were targeted at the plaintiffs, consequently forcing the violation's affects from plaintiffs' level downward through the distribution chain. If plaintiffs did not first incur the antitrust violations, the conspiracy by the defendants would never have been successful. Plaintiffs make no claim to damage recoverable by any party closer to antitrust violation.

3. *These Cases Do Not Affect This Court's Rulings Involving the Offensive and Defensive Use of the "Pass-On" Theory*

This Court's concern in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968) that defendants not avail themeselves to the defense that plaintiffs have "passed-on" the overcharge is not viable in this case. Nor is this Court's rule concerning

offensive use of "pass-on" in *Illinois Brick* a concern in this litigation.

Since no "pass-on" allegations exist, this Court need not alter its *Hanover Shoe* or *Illinois Brick* decisions. Plaintiffs, as producers, were the first parties injured by the antitrust violations. Defendants can neither claim that Plaintiffs were not injured by passing an artificial price—a price lower than it would have been but for the antitrust violations—on to the next level, nor can they claim plaintiffs were indirectly injured since plaintiffs were the originators of the produce in the stream of commerce.

4. *There Is No Complexity or Uncertainty of Proof Involved Which Would Be Contrary to* Illinois Brick

While there will indeed be complex proof, the kinds of proof involved are not new to courts and certainly not to antitrust courts. *In re Beef Industry Antitrust Litigation,* 600 F.2d at 1166. The complexity in which this Court expressed reservation in *Illinois Brick* deals solely with the complexity involved with economics of relevant elasticities of the product—"the percentage change in quantities of the passer's product demanded and supplied in response to a one percent change in price." *Illinois Brick,* 431 U.S. at 742.

This cause is devoid of such complexity and uncertainty. The appropriate measure of damages would merely be the difference between what each farmer was paid and what each farmer should have been paid but for the interference with market force. There are no factors of relevant elasticities, as in *Illinois Brick,* associated with factors which influence a party's decision whether to buy, not buy, or buy a suitable substitute product. All this litigation is concerned with

was the amount of wheat each farmer sold into an artificial market. The condition of the market but for the conspiracy was the actual condition it was in once the news of the Soviet sale was made public, the market price of late September—early October, 1972.

5. *There Can Not Be Duplicate Recovery By Any Other Market Participants*

The federal antitrust statute of limitations, 15 U.S.C. § 15b [23], prohibits an antitrust cause of action from being filed which is not commenced within four years after the cause of action accrues.[24]

There have not been any causes of action brought by any other party removed from these plaintiffs in the chain of distribution since the date of all activities giving rise to these causes of action. Consequently, these plaintiffs are the only parties capable of bringing these claims arising out of the defendants' antitrust activities.

III. PLAINTIFFS SHOULD BE ENTITLED TO REIMBURSEMENT OF REASONABLE EXPENSES, COURT COSTS AND ATTORNEYS' FEES

This litigation, commenced in 1972, had progressed through years of discovery on the merits and on the class issue before its dismissal. In 1975, the plaintiffs

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[23] Any action to enforce any cause of action under Sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U.S.C. § 15b.

[24] *See In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir. 1979), *cert. denied*, 444 U.S. 900 (1979).

were successful in having the district court certify the classes in their respective geographic regions.

However, the district court, in 1979, decertified the classes and dismissed the causes of action solely on the basis of *Illinois Brick*. It would only seem equitable, should this Court not find the district court erred in its application of *Illinois Brick*, that the plaintiffs be reimbursed the reasonable expenses, court costs and attorneys' fees, based on the doctrine of *quantum meruit*, for the years of legal services which would have been productive but for the subsequent holding of *Illinois Brick*.

This Court should review the matter to determine whether an antitrust plaintiff, who brings a class action and is successful in certifying that class, has a claim of right to reimbursement for reasonable expenses, court costs and attorneys' fees based on the doctrine of *quantum meruit* once the cause of action has, *ex post-facto*, been judicially banned.

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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December 1, 1981

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, upon all counsel of record in these proceedings contained within the most recent attorneys list, on the 1st day of December, 1981.

/s/ JAMES W. WITHERSPOON

JAMES W. WITHERSPOON

ADDENDUM